Supreme Court, U.S.
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No. 86-813

In The
Supreme Court of the United States
October Term, 1986

HOMEBOUND HEALTH CARE AGENCY,
Petitioner,

v.

TENNESSEE VALLEY HOME HEALTH AGENCY, ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The Court of Civil Appeals Of The State Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is certiorari to the United States Supreme Court available to the Petitioner under 28 U.S.C. § 1257?

2. Does the decision of the Alabama Court of Civil Appeals present special and important reasons justifying the exercise of judicial discretion under Supreme Court Rule 17?

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TENNESSEE VALLEY HOME HEALTH AGENCY, ET AL.,

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Petition For A Writ Of Certiorari To The Court of Civil Appeals Of The State Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Tennessee Valley Home Health Agency, North Alabama Home Health Agency, and Alacare Home Health Services, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Alabama Court of Civil Appeals' opinion in this case.

OPINIONS BELOW

The memorandum opinion of the Circuit Court of Montgomery County, Alabama has not been reported. It is reprinted in Appendix A hereto. The opinion of the Alabama Court of Civil Appeals has been reprinted as Appendix B hereto. The order of the Supreme Court denying Homebound's Petition for Writ of Certiorari has been reprinted as Appendix C hereto.

———o———

STATEMENT OF THE CASE

This case arises out of the failure of Petitioner to comply with the rules and regulations of the State Health Planning Association (hereinafter "SHPA"). SHPA's Rule 410-1-7.01(22)(b)(1) and (3) provides that any person may, "for good cause shown," request a reconsideration hearing within thirty days following the date of SHPA's final decision. Rule 410-1-7.01(22)(b)(2) provides:

> *Basis for Request.* The basis of requesting a reconsideration hearing *shall be restricted to written presentation of evidence of 'good cause shown' which shall be limited to the following:*
>
> (i) Presentation of *significant, relevant information* not previously considered by the State Agency; or
>
> (ii) Demonstration that there have been *significant changes in factors or circumstances* relied upon by the State Agency in reaching its decision; or

(iii) Demonstration that the State Agency has materially *failed to follow its adopted procedures* in reaching its decision; or

(iv) Provides such *other basis* for a public hearing as the State Agency determines constitutes good cause. "Other basis" may be determined on a case by case basis. (Emphasis added)

On July 10, 1984, the Alabama Certificate of Need Review Board (hereinafter "CONRB") denied the Petitioner Homebound's Certificate of Need Application. During the thirty-day reconsideration request period, counsel for the Petitioner Homebound wrote two letters to the Director of the Bureau of Health Development, Alabama State Health Planning Agency. The CONRB later reconsidered the Homebound CON application and granted Homebound a Certificate of Need. Whereupon, a timely appeal was taken to the Montgomery County Circuit Court by these Respondents.

There were several arguments presented to the Circuit Court by these Respondents supporting their position that the decision of the CONRB should be reversed. The Circuit Court concluded that the above-cited SHPA Rule had not been followed in that Homebound had "failed to contemporaneously file any evidence which showed good cause for granting reconsideration." (See Appendix A). Petitioner Homebound appealed the decision of the Circuit Court to the Alabama Court of Civil Appeals.

The Alabama Court of Civil Appeals concluded that affirmance of the trial judge in the instant case was required by its decision in *Regional Dialysis v. Northeast Alabama Kidney Clinic, Inc.*, 480 So.2d 1226 (Ala. Civ. App.) *cert. denied*, 480 So.2d 1229 (Ala. 1985). In the

closing sentences of its opinion (Appendix B at p.5), the Alabama Court of Civil Appeals made clear the basis for its decision:

> As in *Regional Dialysis*, Homebound's request for a reconsideration was in the form of a letter which made *allegations* unsupported by *any* evidence, whether in the form of affidavits, depositions or documents. Such evidence is required by Rule 410-1-7-.01(22)(b)(2), and SHPDA violated this rule when it granted Homebound's request for reconsideration. (Emphasis added)

The Alabama Court of Civil Appeals did *not* reach the question of whether administrative agencies are necessarily restricted to "legal rules of evidence", and did *not* hold that they are so restricted. Rather, the question was whether a reconsideration request not accompanied by *any* evidence is sufficient, and SHPA's own rules make clear that it is not. The Alabama Court of Civil Appeals found that Homebound did not submit *any* evidence, "legal" or otherwise, thereby failing to comply with SHPA's own conditions for granting a reconsideration hearing. The Alabama Court of Civil Appeals acknowledged that Homebound's counsel explained *what he planned to present later*, but did not provide *any* evidence within the necessary time period. In this respect, the Court of Civil Appeals held (Appendix B, p.4) as follows:

> Though counsel for Homebound provided SHPA in these letters with a fairly clear explanation of what evidence Homebound *planned to present later if* a reconsideration hearing were granted, counsel did not provide SHPA with *any* such written evidence with the letters to establish a basis for granting the reconsideration, as required by Rule 410-1-7-.01(22)(b)(2). *No* such evidence was apparently provided to SHPA

> until October, 1984, after the thirty day time limit had run for requesting a reconsideration by making a written presentation of evidence of good cause. (Emphasis added)

It is important to note that, at the time it rendered the foregoing decision, the Alabama Court of Civil Appeals had before it the Alabama Supreme Court's denial of certiorari in *Regional Dialysis*, with Justice Shores's comment, 480 So.2d at 1229, as follows:

> By denying the petition, we do not intend to be understood as agreeing that administrative agencies are restricted by the Administrative Procedure Act, §§ 41-22-1, et seq., Code 1975, to legal rules of evidence. The Act itself provides:
>
> > [T]he rules of evidence as applied in non-jury civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.
>
> *We agree, however, with the holding of the Court of Civil Appeals*, 480 So.2d 1226. (Emphasis added)

WRIT DENIED.

Homebound next petitioned the Alabama Supreme Court for a Writ of Certiorari. Homebound was unable to establish any of the grounds for certiorari authorized by Rule 39(c) Alabama Rules of Civil Procedure. *The Homebound Petition for Writ of Certiorari was denied by the Alabama Supreme Court.*

Petitioners are now asking the United States Supreme Court to grant certiorari and review a decision by the Alabama Court of Civil Appeals related solely to a matter of state law.

—o—

REASONS WHY THE PETITION SHOULD BE DENIED

1. Certiorari To The United States Supreme Court Is Not Available Under 28 U.S.C. § 1257.

The jurisdiction of the United States Supreme Court to review decisions of state courts is set forth at 28 U.S.C. § 1257, which provides, in relevant part, as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity . . . of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The effect of the foregoing statute is summarized at 32A Am.Jur.2d Federal Practice, § 660, p.158, as follows:

> The Supreme Court's jurisdiction to review a state court decision under 28 USCS § 1257, whether by appeal or by certiorari, is dependent upon the presence of a federal question in the case. The reason for this requirement is that the Supreme Court is not a court of general jurisdiction which can correct any error

> in state court proceedings; its powers are limited to correcting denials of federal rights in specific instances. Thus, the Supreme Court can only deal with cases raising issues pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin.

The Homebound case does not involve a federal question or the contention that any statute of the state of Alabama violates federal law. At no time during the course of this litigation has Homebound raised any federal issue, or contended that any Alabama statute was unconstitutional, nor could it so contend because there is no such issue in these facts. The sole issue decided by this Court was whether or not, under SHPA procedures for granting reconsideration, the requirement of submission of evidence of "good cause" within thirty days, was sufficiently met by a letter from Homebound's attorney merely setting forth what Homebound planned to present at some future time, with no supporting evidence of any kind.

Homebound's own statement of the issue before the Alabama Court of Civil Appeals did not assert a federal question. Homebound characterized the issue on appeal to the Alabama Court of Civil Appeals as follows:

> Because this is the review of the administrative agency's decision, the issue for review is simply whether the decision of the agency was correct and proper as a matter of law. That is, there is a presumption of correctness which attaches to the decision of the administrative agency and it will be presumed correct and proper unless there is shown to have been an arbitrary, caparicious or abusive decision by the agency or a decision not made in conformity with applicable law. (Homebound Br. in Ct. of Civ. App., p. iv).

Even in Homebound's rejected Petition of Certiorari to the Alabama Supreme Court, in which it undertook to alter the relevant question somewhat, Homebound did not assert a federal question or contend that any Alabama statute violated federal law. In its brief and argument in support of its Petition for Certiorari to the Alabama Supreme Court, Homebound formulated the issue (at page 1) as follows:

> The issue for resolution by this Court is a material question of first impression in Alabama: Does the Administrative Procedure Act, §§ 41-22-1 *et seq., Code 1975* and specifically § 41-22-13 *Code 1975*, restrict administrative agencies to legal rules of evidence? Your Petitioner suggests the Court of Civil Appeals erred when it answered that question in the affirmative.

If Homebound ever had a federal question to present (and we know of none), *it is too late to raise it for the first time now in a Petition for Certiorari to the United States Supreme Court.* The Supreme Court has made clear that it is essential that a federal question be brought to the attention of the state court hearing the case, and the record must show that the federal questions were raised in the state courts. *Greenbay v. Patten Paper*, 172 U.S. 58, 43 L.Ed 364, 19 S.Ct. 97; *Whitney v. California*, 274 U.S. 357, 71 L.Ed 1095, 47 S.Ct. 641. These holdings are summarized at 32A AmJur.2d Federal Practice § 663, p.59, as follows:

> In order to obtain review of a state court decision in the United States Supreme Court pursuant to 28 USCS § 1257, it must affirmatively appear from the record, at least by clear and necessary implication, that *a substantial federal question was presented to the state court and was passed upon by that court.*

> If nothing in the record indicates that a federal question was presented to the state court, the Supreme Court will not take judicial notice that federal question might have been involved in the case. (Emphasis added)

2. This Case Does Not Present Special And Important Reasons Justifying The Exercise Of Judicial Discretion Under Supreme Court Rule 17.

The state courts of Alabama have established the law in this state that the *basis for requesting a reconsideration pursuant to SHPA Rule 410-1-7-.01(22)(b) shall be restricted to the written presentation of some evidence of good cause shown.* The Alabama courts have ruled precisely in accordance with a clear reading of this SHPA Rule. State law remains as clear today as it did at the time of Homebound's faulty reconsideration request.

The Alabama Court of Civil Appeals did not decide a federal question. This Court need not undertake the additional step of determining whether this decision is in conflict with decisions of this and other courts. The decisions of the Alabama state courts interpreting the Alabama SHPA Rules are solely a matter of Alabama state law. The decision of the Alabama Court of Civil Appeals certainly does not conflict with applicable decisions of the Supreme Court of Alabama, the federal courts of appeals, and this Court. Despite the assertions of the Petitioner, there remains no important unsettled federal question that under Rule 17 would justify the Court's exercise of its certiorari jurisdiction.

———o———

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ .....
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APPENDIX A

IN THE CIRCUIT COURT FOR
MONTGOMERY, COUNTY, ALABAMA

CV-85-118-G

TENNESSEE VALLEY, etc.,

Plaintiff,

vs.

CERTIFICATE OF NEED REVIEW BOARD AND
HOMEBOUND HEALTH CARE AGENCY,

Defendant.

MEMORANDUM OPINION

Tennessee Valley Home Health Agency (Tennessee), North Alabama Home Health Agency, Inc., (North Alabama) and Alacare Health Care (Alacare) have appealed the decision of the Alabama State Health Planning and Developement Board (SHPDA) granting Homebound Health Care Agency (Homebound) a certificate of need to operate a home health agency.

Homebound filed it's application for a certificate of need in January, 1984 with SHPDA. On July 10, 1984 a hearing was held before the SHPDA Board and the application was denied. On August 7, 1984 counsel for Homebound sent a letter to the board requesting a reconsideration of Homebound's application. Counsel stated in his letter that "[T]he applicant [Homebound] has been, and continues to be, in the process of compiling such significant and relevant information that has been requested by the Board itself". SHPDA granted the reconsideration

request and in a later hearing granted Homebound's application for a certificate of need.

Tennessee, North Alabama and Alacare contend that the Board did not follow it's own procedures, rules and regulations in granting the reconsideration request because at the time the request was made Homebound failed to contemporaneously file any evidence which showed good cause for granting reconsideration.

The court holds that his position is well taken because the letter was legally insufficient to show good cause for the grant of a reconsideration hearing. Homebound failed to set forth any "affidavits, depositions or documents" necessary to show cause. *Regional Dialysis of Anniston vs. Northeast Alabama Kidney, Inc.*, — So.2d — [Ms. Civ. 4764, July 17, 1985] (Ala. Civ. App. 1985). The letter submitted is not sufficient by itself to show good cause. It only references letters signifying support for the new agency which were previously submitted to SHPDA in the original applications; and it does not attach any affidavits, depositions or new documents supporting the allegations of "significant, relevant information not previously considered by the state agency. . . ." *Alabama State Health Planning Agency* Rule 410-1-7-.01(22)(b)(2). *Regional Dialysis* at 5. SHPDA cannot approve an application based solely on hearsay, consequently, it cannot approve a reconsideration request based solely on hearsay or upon hearsay coupled with matters previously considered by the Board.

The court holds that SHPDA failed to follow it's adopted procedures when it granted the reconsideration request and subsequent approval of the application.

An appropriate judgment will be entered in accordance with this memorandum opinion.

DONE on this 4th day of October, 1985.

/s/ William R. Gordon
Circuit Judge

Justice Smyth
Charles Crook
Attorney General
Peggy Schmidt

APPENDIX B

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1985-86

Civ. 5146

Homebound Health Care Agency

v.

Tennessee Valley Home Health Agency, et al.

Appeal from Montgomery Circuit Court

(April 16, 1986)

HOLMES, JUDGE

This is a case arising under the statutes and regulations governing the State Health Planning and Development Agency (SHPDA).

In early 1984, Homebound Health Care Agency (Homebound) filed an application with SHPDA for a certificate of need (CON) for the establishment of a home health agency which would offer services through health care facilities in four north Alabama cities. On July 10, 1984, following a hearing, SHPDA's CON Review Board denied Homebound's CON application.

Subsequently, however, Homebound requested and was granted a reconsideration hearing with respect to the CON. Following the reconsideration hearing, SHPDA, acting through the CON Review Board, granted the CON to Homebound.

Three opponents of the Homebound CON then filed suit in the Circuit Court of Montgomery County, challenging SHPDA's granting of the CON on several grounds.

The circuit court held that SHPDA had failed to follow its own procedures when it granted Homebound's request for a reconsideration hearing, and it entered a judgment reversing the granting of the CON to Homebound.

From this adverse judgment, Homebound appeals. We agree with the holding of the circuit court and affirm.

Pursuant to the Alabama Administrative Procedure Act, Ala. Code (1975), §§ 41-22-1 through -27, SHPDA, as most state agencies, has promulgated rules and regulations governing much of its operations. Such rules include those which set forth procedural requirements for requesting a reconsideration hearing of a SHPDA decision.

SHPDA's Rule 410-1-7-.01(22)(b)(1) and (3) provides that any person may, "for good cause shown," request a reconsideration hearing within thirty days following the date of SHPDA's final decision. Rule 410-1-7-.01(22)(b)-(2) provides:

"*Basis for Request.* The basis of requesting a reconsideration hearing shall be restricted to written presentation of evidence of 'good cause shown' which shall be limited to the following:

"(i) Presentation of *significant, relevant information* not previously considered by the State Agency; or

"(ii) Demonstration that there have been *significant changes in factors or circumstances* relied upon by the State Agency in reaching its decision; or

"(iii) Demonstration that the State Agency has materially *failed to follow its adopted procedures* in reaching its decision; or

"(iv) Provides such *other basis* for a public hearing as the State Agency determines constitutes

> good cause. 'Other basis' may be determined on a case by case basis."

Applying this rule to the present case, as the circuit court did, it is quite apparent that Homebound did not meet the rule's requirement that it make a "written presentation of evidence of 'good cause shown,'" Rule 410-1-7-.01(22)(b)(2), within thirty days following the July 10, 1984, denial of the CON. Rule 410-1-7-.01(22)(b)(3).

The record shows that on August 7, 1984, within the thirty-day time limit for requesting a reconsideration hearing, counsel for Homebound wrote a letter to SHPDA requesting a reconsideration. The letter stated, in part:

> "The basis for this request is to allow the applicant to present significant and relevant information which was not previously considered by the State Agency and which is being presently compiled by the applicant at the suggestion of the Board. In particular, the Board stated to the applicant that, in order for its application for a Homebound Healthcare Agency to be approved, the applicant should show to the Board members specific cases in which patients in the proposed service area are not being adequately and properly served by existing home health services or agencies. Based on this, the applicant has been, and continues to be, in the process of compiling such significant and relevant information as has been requested by the Board itself. Therefore, in order to present such information, a reconsideration hearing is required."

Two days later, on August 9, 1984, counsel for Homebound again wrote SHPDA concerning the reconsideration request and gave a more detailed explanation of what evidence Homebound planned to present on reconsideration. The August 9 letter stated, in part:

> "There is new and relevant information which can, and, respectfully, should be presented to the Board members, regarding the inadequacy of the existing service which is being currently provided by the home health agencies in the proposed service area. Additionally, there are specific cases, as referred to in our August 7, 1984, letter, in which patients in the proposed service area have not been adequately or appropriately treated and served by the existing home health services or agencies. We expect the scope of the new and additional information to center around the inadequacies of the existing services, a matter which was not addressed at the July 10 hearing. While the applicant chose to primarily address only the positive aspects of its own application, rather than making comparisons and contrasts to existing facilities, it is now clear that the Board is interested in such a comparison and the applicant is prepared to move forward and meet such request with evidence and testimony."

Though counsel for Homebound provided SHPDA in these letters with a fairly clear explanation of what evidence Homebound planned to present later if a reconsideration hearing were granted, counsel did not provide SHPDA with any such written evidence with the letters to establish a basis for granting the reconsideration, as required by Rule 401-1-7-.01(22)(b)(2). No such evidence was apparently provided to SHPDA until October 1984, after the thirty-day time limit had run for requesting a reconsideration by making a written presentation of evidence of good cause.

In *Regional Dialysis v. Northeast Alabama Kidney Clinic, Inc.*, 480 So. 2d 1226 (Ala. Civ. App.) *cert. denied*, 480 So. 2d 1229 (Ala. 1985), this court was presented with a situation quite similar to that now before us. In that

case a CON was granted to Northeast Alabama Kidney Clinic for a dialysis facility. Regional Dialysis filed a motion for reconsideration of the approval of the CON. SHPDA's CON Review Board granted the reconsideration, as it did in the present case, and on reconsideration reversed its decision and denied Northeast's CON.

Affirming the circuit court in *Regional Dialysis,* this court held that SHPDA had erroneously granted the reconsideration hearing requested by Regional Dialysis. Regional's request had been in the form of a letter, which alleged that SHPDA had failed to follow its procedures and cited certain SHPDA statutes and rules relating to substantive review criteria, rather than procedure.

This court, speaking through our Presiding Judge Wright, found that Regional's letter did not contain any evidence, such as affidavits, depositions, or documents, which supported its allegations. As such, we held that "Regional did not show 'good cause' for its reconsideration request," as required by Rule 410-1-7-.01(22)(b)(2) and that SHPDA had improperly granted the reconsideration request. *Regional Dialysis,* 480 So. 2d at 1228.

The *Regional Dialysis* case requires our affirmance in the instant case. As in *Regional Dialysis,* Homebound's request for a reconsideration was in the form of a letter which made allegations unsupported by any evidence, whether in the form of affidavits, depositions, or documents. Such evidence is required by Rule 410-1-7-.01(22)(b)(2), and SHPDA violated this rule when it granted Homebound's request for reconsideration.

This case is due to be, and it is, affirmed.

AFFIRMED,

Wright, P.J., and Bradley, J., concur.

APPENDIX C

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 22, 1986

85-1024

EX PARTE: HOMEBOUND HEALTH CARE AGENCY

PETITION FOR WRIT OF CERTIORARI

(Re: Homebound Health Care Agency v. Tennessee Valley Home Health Agency, et al.)

CIV 5146

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

HOUSTON, J. — TORBERT, CJ., MADDOX, ALMON & BEATTY, JJ., CONCUR.